LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 29 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

311

JAMES TYGART [redacted] APPELLANT

vs.

STATE OF ARKANSAS ..... APPELLEE

JURISDICTIONAL STATEMENT
AND
APPENDED OPINION AND AFFIRMANCE

APPEAL FROM ARKANSAS SUPREME COURT

Jeff Davis Duty, Jr.
and
Jeff D. Duty
ATTORNEYS FOR APPELLANT

209 West Elm Street
Rogers, Arkansas 72756

IN THE

Supreme Court of the United States

JAMES TYGART ..... APPELLANT

vs.

STATE OF ARKANSAS ..... APPELLEE

JURISDICTIONAL STATEMENT

AND

APPENDED OPINION AND AFFIRMANCE

APPEAL FROM ARKANSAS SUPREME COURT

JURISDICTIONAL STATEMENT

A. The case of James Tygart, appellant, v. State of Arkansas, No. 5456, is unreported except in the advance sheets for February 23, 1970, of the Supreme Court opinions. It will be reported as Tygart v. State, 248 Ark. 125, 451 S.W. 2d 255.

B. The appellant invokes the jurisdiction of the Supreme Court of the United States on the grounds that the proceeding in this case is in violation of Amendment 4 to the Constitution of the United States and Amendment 14 to the Constitution of the United States.

(1) This proceeding involves the question of unlawful searches and seizures in violation of Amendment 4 to the Constitution of the United States and is

brought under Title 28, Section 1257, United States Code Annotated.

(2) The opinion was delivered by the Arkansas Supreme Court on February 23, 1970, and upon petition for rehearing (R 73) said petition was denied on the 30th day of March, 1970, on which date the judgment of the Supreme Court of Arkansas became final. Notice of appeal was filed on May 28, 1970, in the Supreme Court of Arkansas.

(3) It is submitted that Title 28, Section 1257, United States Code Annotated is believed to confer on this court jurisdiction of the appeal.

(4) It is believed that **Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. (2) 441, Mapp v. Ohio, 376 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. (2) 1081, Siborn v. New York, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. (2) 917,** and **Carroll v. U. S., 267 U.S. 132,** sustained the jurisdiction.

C. The questions presented are:

(1) Whether Amendment 4 to the Constitution of the United States requires the issuance of a search warrant to be based upon a written affidavit under oath or affirmation. In this case the search warrant was not based upon a written affidavit and no affidavit was filed prior to the issuance of the search warrant.

(2) The question is whether or not the search of the automobile of the appellant without arrest and prior to arrest and without a search warrant was a lawful search and seizure under **Siborn v. New York, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. (2) 917,** said search being used as a justification for an arrest.

D. The Arkansas officers had information that the appellant would be returning from Mexico with a

quantity of illegal drugs and that he would be driving a 1970 red and white Rambler.

(1) The officers arranged a stake-out or road block on the highway over which this car would travel. The officers had no search warrant. They stopped the car, asked for the appellant's driver's license, had him get out of the car and then, without placing him under arrest for any violation, proceeded to search the car. The officers discovered a quantity of drugs in their search and after the search, placed the appellant under arrest.

(2) The next day the officers procured a search warrant without filing an affidavit for a search warrant and proceeded to search the car a second time. Another quantity of drugs were found in this search. These questions were presented to the trial court during the trial by virtue of motions to suppress and presented to the Supreme Court of Arkansas in the appeal to the Supreme Court of Arkansas. These questions of violation of Amendment 4 to the Constitution of the United States and Amendment 14 to the Constitution of the United States were overruled by the Supreme Court of Arkansas. The refusal to suppress the evidence thus obtained was overruled by the trial court and the Supreme Court of Arkansas. The questions were raised in the trial court during the trial and in the Supreme Court of Arkansas (R 24, 47, 74, 75, 76, 77, 78, 79, 80), and in the motion for new trial (R 7-9). All of these contentions were overruled by the trial court and the Supreme Court. The contentions were made in both courts that the proceeding in this cause was in violation of Amendment 4 to the Constitution of the United States as applied to the states by Amendment 14 to the Constitution of the United States.

E. In view of the holdings in **Siborn v. New**

York, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. (2) 917, and **Wong Sun v. U.S., 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. (2) 441,** in which it is held that the success of a search will not validate it and that searches preceding the arrest and used as justification for arrest cannot stand, it is contended that search without the search warrant presents a substantial federal question. It is the contention of the appellant:

(1) That the original search was used as a justification for the arrest. That it was reasonably practicable for the officers to have obtained a search warrant under **Carroll v. U.S., 367 U.S. 132.**

(2) It is the contention of the appellant that Amendment 4 to the Constitution of the United States requires a written affidavit upon which to base the issuance of a search warrant. It is submitted that research has not revealed any decisions of the United States Supreme Court on this question. It is therefore submitted that a substantial federal question is involved, for the just administration of the criminal law and in view of the fact that the United States Supreme Court has not heretofore passed on this question.

I. The opinion of the Supreme Court of Arkansas is appended hereto, which contains the judgment of affirmance of this cause, which became final on March 30, 1970, upon denying the motion for rehearing.

Respectfully submitted,

JEFF DAVIS DUTY, JR., and
JEFF D. DUTY
209 West Elm Street
Rogers, Arkansas 72756

Attorneys for Appellant

IN THE CIRCUIT COURT OF
WASHINGTON COUNTY, ARKANSAS

THE STATE OF ARKANSAS ..... PLAINTIFF
VS. No. 4629
JAMES TYGART ..... DEFENDANT

ORDER

Now on this 12th day of August, 1969, comes on for trial the defendant, James Tygart, on the charge of illegal possession of depressant or stimulant drugs on or about the 22nd day of May, 1969, and the defendant appearing in person and by his attorney, Jeff Duty, and the State appearing by Mahlon G. Gibson, prosecuting attorney, and James O. Burnett, deputy prosecuting attorney, and both sides having announced ready for trial, a jury of twelve of the regular April, 1969 panel of petit jurors was selected and sworn, and after hearing the evidence, instructions of the Court, and argument of counsel, retired, and after deliberation, returned the following verdict into court:

> "We, the jury, find defendant, James Tygart, guilty of possession of illegal depressant or stimulant drugs without a valid prescription and fix his punishment at two years in the state penitentiary and a fine of $2000.00 (Prison—not to exceed 2 years.).
>
> /s/ Gene B. Jordan
> Foreman,

which verdict the Court accepted, and sets August 18th, 1969 as the date for pronouncement of sentence.

IT IS, THEREFORE, ORDERED AND AD-

JUDGED that the defendant, James Tygart, be and is hereby found guilty of illegal possession of depressant or stimulant drugs on or about the 22nd day of May, 1969, and his punishment is hereby fixed at two years in the state penitentiary and a fine of $2,000.00, and court costs.

ENTERED this 18th day of August, 1969.

/s/ Maupin Cummings
CIRCUIT JUDGE

IN THE SUPREME COURT OF ARKANSAS

JAMES TYGART ..... APPELLANT

VS. No. 5456

THE STATE OF ARKANSAS ..... APPELLEE

OPINION

Appellant James Tygart was convicted of violating the Arkansas Drug Abuse Control Act. He was found in possession of an automobile containing a large quantity of dextroamphetamine tablets, marketed under the trademark Dexedrine. Appellant here alleges the drugs to have been confiscated under illegal searches and seizures; also, he contends that the testimony of the accomplice was not substantially corroborated.

The facts incident to Tygart's first encounter with the officers are brief. Officer Quimby Johnson testified that he and two fellow officers were on the lookout for Tygart; that from facts furnished Johnson by a confidential source, Johnson had reasonable grounds to believe that Tygart was returning from Mexico in

a red and white Rambler station wagon with a large quantity of Dexedrine tablets. At approximately 3:30 a.m. on May 22, the officers spotted the described vehicle on Highway 68 just east of Tontitown, Washington County, and recognized the driver, Tygart. The latter stopped the station wagon on signal from the officers. After checking Tygart's driver's license, the officers made a cursory search of the car and found 120 bottles of tablets. After that discovery the officers placed Tygart and his companion under arrest. The first point for reversal is that the fruits of the described search, having been made without a search warrant, were not admissible in evidence, being precluded by the unreasonable search provisions in the Fourth Amendment to the United States Constitution and Ark. Const. art. 2, § 15.

The right of officers to stop and there search a motor vehicle under certain circumstances without a warrant or previous arrest was treated thoroughly in 1925 with the pronouncement in **Carroll v. U.S.**, 267 U.S. 132. The fundamental requirements of the "Carroll Ruse" are (1) that the officers have reasonable cause to believe the vehicle contains that which by law is subject to seizure, and (2) that it is not reasonably practicable to obtain a search warrant. To the same effect see Wharton's Criminal Law and Procedure (12th Ed. 1957); also see **Chimel v. California**, 395 U.S. 752 (1969). In **Burke v. State**, 235 Ark. 882, 362 S.W. 2d 695 (1962), the officers stopped the car and searched it without a warrant. In upholding the reasonableness of the search this court said:

> In the case at bar, the testimony of the officers as to the heavily loaded car, their knowledge of appellant's reputation as a known bootlegger, and the strong odor of wile-cat whiskey

in the car all add up to probable cause for the search.

In commenting on the search of an automobile involved in **Mann v. City of Heber Springs,** 239 Ark. 969, 395 S.W. 2d 557 (1965), we said:

> It is true that not all searches and seizures without a warrant are prohibited. Only those searches and seizures which are unreasonable are prohibited by the Fourth Amendment to the United States Constitution and Art. 2, § 15, Arkansas Constitution. We recognize the rule that an automobile may be searched without a warrant where there is reasonable or probable cause for the belief of the officers that contents of the automobile offend against the law.

In view of the total circumstances in the case before us, we think the search was reasonable and the fruits of that search admissible. Officer Johnson testified that he had been reliably informed that James Tygart would be returning from Mexico with a quantity of illegal drugs and that he would be driving a 1960 red and white Rambler. Subsequently, and at an unusual night hour, Johnson identified the car and the driver on a "back-door route" to Springdale or Fayetteville, his logical destinations. Appellant did not challenge the search on the grounds that it would have been practicable under the circumstances for the officer to have obtained a search warrant before making a cursory examination of the contents of the vehicle.

Now to the second search of the automobile. In the afternoon of May 23, Officer Johnson obtained a search warrant from Judge Cummings, searched the car, and found an additional box containing 128 bottles

of Dexedrine tablets. Appellant moved to suppress that evidence on the ground that the State could not produce an affidavit upon which the issuance of the search warrant should have been based. Neither Officer Johnson nor Judge Cummings could state for certain that an affidavit was in fact executed. It is undisputed that Officer Johnson related under oath to Judge Cummings facts which constituted probable cause for the search. Thereupon the judge executed a standard printed form search warrant under inserting in his handwriting the substance of the facts related to him by Officer Johnson. That warrant was introduced in evidence over appellant's objection. The warrant reads:

SEARCH WARRANT

In the Circuit Court of
Washington County, Arkansas

COUNTY OF WASHINGTON)
STATE OF ARKANSAS) ss

TO ANY SHERIFF, CONSTABLE OR POLICEMAN IN THE STATE OF ARKANSAS:

Affidavit having been made before me by Quimby Johnson that he has reason to believe that on the premises known as 1960 Rambler Station Wagon, License #AGE 157, registered to Chester Hill, located behind Washington Co. Court House in the City of Fayetteville, County of Washington, State of Arkansas, there is now being concealed certain property, namely firearms and/or amphetamine and other stimulant and depressant drugs and said car for the reason some firearms and illegal drugs were found on the floor of the said station wagon when the

car was stopped and the occupant, James Harvey Tygart was arrested. He was taken by me to the County Jail before I had completed search of the car and I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

YOU ARE HEREBY COMMANDED to search forthwith the place named for the property specified, serving this warrant and making the search at any time in the day or night and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property as required by law.

DATED this 23 day of May, 1969.

(Signed) Maupin Cummings, Circuit Judge

Most jurisdictions, federal and state, have statutes requiring a written affidavit as a prerequisite to the issuance of a search warrant. In fact they are so numerous that most text writers flatly state as a general rule of law that a written affidavit is required. We have no general and comprehensive search warrant statute. As various criminal laws have been enacted the Legislature has added a search provision in those situations when it was deemed needed. Examples of such statutes are gaming, stolen property, prostitution, machine guns, and intoxicating liquors. None of those specific statutes requires a written affidavit for a search warrant.

The Constitution of the United States, amendment

4, and Ark. Const. art. 2, § 15, are almost identical, and we see no substantive difference. Our Section 15 is as follows:

> UNREASONABLE SEARCHES AND SEIZURES. — The right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

The phraseology is not complicated. They both require a showing of probable cause, supported by oath or affirmation, and the warrant must particularly describe the place to be searched and the objects to be seized. There is no mention of a written affidavit.

We find three jurisdictions in which the courts dealt with the same phraseology contained in the provisions above cited. The statutes of Washington require only an oath or affirmation to support a finding of probable cause. In two different cases writings were presented to the magistrate and they were both void. However, in each case, witnesses appeared before the magistrate and gave oral testimony. **State v. Walcott,** 435 P. 2d 994 (Wash. 1967); **State v. Malbeck,** 419 P. 2d 805 (Wash. 1966). In **Walcott** the court said:

> Although the federal practice, which results in making and preserving a contemporaneous record of the proceedings before the magistrate, may be preferable; however, it is not a constitu-

tional requirement under the Fourth Amendment.

Sparks v. U. S., 90 F. 2d 61 (1937). At the time of the decision in **Sparks** the Criminal Code, 18 U.S.C.A. § 287, authorized the issuance of a search warrant upon a showing of probable cause submitted under oath or affirmation. The affidavit which formed the basis of the search warrant was insufficient. However, the United States Commissioner testified that the affiant's informant appeared before him under oath and related that the accused had told him that he had counterfeit molds at his home. The court held that the oral testimony related by the Commissioner was sufficient to support a finding of probable cause. The court related that it had been cited no case (save one which was not in point) construing a search warrant statute such as the one cited which holds that competent oral testimony does not establish probable cause. The court said, "oath or affirmation," within the meaning of the Fourth Amendment, includes sworn oral, as well as written, testimony.

In **United States ex rel. Boyance v. Myers, Superintendent**, 270 F. Supp. 734 (1967), Boyance sought to set aside a Pennsylvania conviction of 1961. He attacked the validity of the search of his home and automobile. The affidavit for the search warrant did not support a finding by the judicial officer that there was probable cause for the issuance of the warrant. However, it being established that the officer who obtained the warrant gave sufficient unrecorded oral testimony, the warrant was held valid. There the court said:

> The Fourth Amendment requires only that probable cause be 'supported by Oath or Affir-

> mation,' it does not require that the support be in writing. Oral testimony as well as affidavit in writing, may serve as the basis for the issuance of a warrant under constitutional standards.

There can be no question as to the better procedure. The preservation of the proceedings before the magistrate issuing the warrant is much to be preferred. Time erases the availability of witnesses and the memory of those witnesses still available, particularly in the instances of the many belated petitions in criminal cases. On the other hand, it is not for us to insert the provision into the law.

Finally, appellant contends that the corroboration of the accomplice is insufficient to sustain the verdict. Harry Lane testified that he furnished the automobile for the trip; that the two went to Mexico for the purpose of buying Dexedrine tablets; and that appellant made the purchase and loaded the two boxes in the car. When appellant was apprehended he was driving the vehicle; he was driving on a secondary highway at 3:30 a.m. Within reach of his right arm were two weapons, and immediately to the rear of the front seat, and within the driver's reach, were 120 boxes of illegal cargo. Harry Lane was sleeping in the rear of the vehicle. The facts we have recited tend to connect appellant with the crime and that is sufficient, it being found that the corroborating evidence is substantial.

Affirmed.

Byrd, J., dissents.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 20 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court Of The United States

311

JAMES TYGART ..... *Appellant*

VS.

STATE OF ARKANSAS ..... *Appellee*

MOTION TO DISMISS APPEAL

APPEAL FROM ARKANSAS SUPREME COURT

JOE PURCELL
Attorney General.

ROBERT D. SMITH, III
Deputy Attorney General

Justice Building
Little Rock, Arkansas 72201

Attorneys for Appellee

REQ. NO. A1872 50 COPIES JULY 10, 1970
TREVATHAN PRINTING COMPANY, BATESVILLE, ARKANSAS

CITATIONS

Page

Constitutional Provisions:

U.S. Const. Amendment IV 4, 5

Federal Statutes:

28 U.S.C. § 1257 ..... 2, 3

28 U.S.C. § 2103 3

Rules:

28 U.S.C. Supreme Court Rule 15 (e) 6

28 U.S.C. Supreme Court Rule 19 10

Cases:

Aguilar v. Texas, 378 U.S. 108 (1964) 5

Akins v. Texas, 325 U.S. 398 (1945) 9

Carroll v. United States, 267 U.S. 132 (1925) 8, 10

El Paso v. Simmons, 379 U.S. 497 (1965) 3

Ker v. California, 374 U.S. 23 (1963) 5, 6, 8, 9

Jones v. United States, 362 U.S. 257 (1960) 5

Mishkin v. New York, 383 U.S. 502 (1966) 3

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 7

Siborn v. New York, 392 U.S. 40 (1968) 5

Terry v. Ohio, 392 U.S. 1 (1968) 5; 10

United States v. Ventresca, 380 U.S. 102 (1965) 5

Zucht v. King, 260 U.S. 174 (1922) 6

IN THE

Supreme Court Of The United States

JAMES TYGART ..... *Appellant*

VS.

STATE OF ARKANSAS ..... *Appellee*

MOTION TO DISMISS APPEAL

APPEAL FROM ARKANSAS SUPREME COURT

MOTION TO DISMISS

Appellant James Tygart was convicted of violating the Arkansas Drug Abuse Control Act. He was found in possession of an automobile containing a large quantity of dextroamphetamine tablets, marketed under the trademark Dexedrine. He appealed his conviction to the Supreme Court of Arkansas, alleging that the drugs were confiscated under illegal searches and seizures. From the decision of the Supreme Court of Arkansas affirming his conviction, he seeks an appeal to this Court. A copy of that opinion is appended to Tygart's jurisdictional statement.

QUESTIONS PRESENTED

I. DOES THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRE THE ISSUANCE OF A SEARCH WARRANT TO BE BASED ON A WRITTEN AFFIDAVIT MADE UNDER OATH OR AFFIRMATION?

II. WAS THE SEARCH WITHOUT A WARRANT OF APPELLANT'S AUTOMOBILE AT THE TIME OF HIS ARREST A LAWFUL SEARCH AND SEIZURE?

THIS APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT BECAUSE IT IS NOT TAKEN IN CONFORMITY TO THE STATUTE ALLEGED TO CONFER JURISDICTION.

In his jurisdictional statement Appellant James Tygart relies on 28 U.S.C. § 1257 (1964) to confer on this Court jurisdiction of this appeal. This section authorizes an appeal from the highest court of a state to the Supreme Court in two situations. The first is where there is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity. The second situation is where there is drawn into question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

At no point in this litigation, at trial, on appeal to the Supreme Court of Arkansas or in his jurisdictional statement on appeal to this Court, has the appellant asserted the validity or invalidity of any statute, treaty or Constitution. Neither has any court, at any stage in these proceedings passed on the validity or invalidity of any statute, treaty, or Constitution.

The appellant is urging here the impropriety of the admission into evidence of certain pills and containers because they are the fruits of searches and seizures which he alleges to have been conducted contrary to his rights under the Fourth Amendment. A claim that evidence was

improperly admitted because it was the fruit of an illegal search and seizure has been held not capable of being brought to this Court by appeal, but only by a petition for a writ of certiorari under 28 U.S.C. § 1257 (3) as specifically setting up a Federal Constitutional right. *Mishkin v. New York*, 383 U.S. 502 (1966).

Therefore, the State of Arkansas respectfully submits that 28 U.S.C. § 1257 (1964) does not confer jurisdiction on this Court to hear the present appeal.

EVEN IF THE PAPERS WHEREON THIS APPEAL WAS TAKEN SHALL BE REGARDED AND ACTED ON AS A PETITION FOR WRIT OF CERTIORARI AND AS IF DULY PRESENTED TO THE SUPREME COURT AT THE TIME THE APPEAL WAS TAKEN, THIS COURT SHOULD NOT REVIEW IN THIS CASE THE DECISION OF THE SUPREME COURT OF ARKANSAS.

As was pointed out above, the State of Arkansas urges that this appeal was improvidently taken from a decision of the Supreme Court of Arkansas. It is provided in 28 U.S.C. § 1257 (1964) that where any right, privilege or immunity is specially set up or claimed under the Constitution, the proper method of seeking a review of the judgment by this Court is by writ of certiorari. It is further provided in 28 U.S.C. § 2103 (1964) that if an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a state, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but, the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. The decision in *El Paso v. Simmons*, 379 U.S. 497,

(1965), requires that the papers whereon the appeal was improvidently taken be treated as a petition for certiorari and dealt with accordingly.

Therefore, the arguments set out below are advanced both to resist a finding by this Court of jurisdiction to hear this appeal and to show that the appellant has presented no special and important reasons which would cause this Court to grant a petition for certiorari in this matter.

QUESTION ONE

DOES THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRE THE ISSUANCE OF A SEARCH WARRANT TO BE BASED ON A WRITTEN AFFIDAVIT MADE UNDER OATH OR AFFIRMATION?

A.

THIS QUESTION PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

The first question sought to be presented by the appellant in his jurisdictional statement is whether Amendment Four to the Constitution of the United States requires that a search warrant be based upon a written affidavit made under oath or affirmation.

The Fourth Amendment is as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, sup-

ported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The phraseology is not complicated. The amendment requires a showing of probable cause, supported by oath or affirmation, and the warrant must particularly describe the place to be searched and the objects to be seized. There is no mention of a written affidavit.

A state is free to develop its own law of search and seizure to meet the needs of local law enforcement, so long as it does not authorize police conduct which trenches upon the Fourth Amendment rights, and upon review the question is whether the search was reasonable under the Fourth Amendment. *Siborn v. New York,* 392 U.S. 40, (1968); *Ker v. California,* 374 U.S. 23, (1963). An evaluation of the constitutionality of a search warrant should begin with the rule that the informed and deliberate determinations of magistrates empowered to issue warrants are to be preferred over the hurried action of officers who may happen to make arrests. *Aguilar v. Texas,* 378 U.S. 108 (1964). The Constitution forbids only unreasonable searches. *Terry v. Ohio,* 392 U.S. 1 (1968). The reviewing court will pay substantial deference to a judicial determination of probable cause for the issuance of a search warrant where the magistrate performs his neutral and detached function and does not serve merely as a rubber stamp for the Police. *United States v. Ventresca,* 380 U.S. 102 (1965), *Jones v. United States;* 362 U.S. 257 (1960).

In this case there is no allegation that probable cause was lacking when the warrant was issued. In its opinion in this case the Supreme Court of Arkansas stated, "It is undisputed that Officer Johnson [the Police officer] re-

lated under oath to Judge Cummings [the issuing magistrate] facts which constituted probable cause for the search." 451 S.W.2d 225 at 226.

It is respectfully urged by the State of Arkansas that the procedure followed in this case is in accord with the law of Arkansas, and that it is apparent that this procedure is not contrary to the rights of the appellant which are guaranteed by the Fourth Amendment to the Constitution of the United States. *Ker v. California, supra.* The appellant does not question that the search warrant involved herein was issued upon probable cause supported by the oath of the Officer seeking the warrant. Neither does he question the neutrality of the Judge who issued the warrant. The appellant has failed to assert or show that the absence of a supporting *written* affidavit rather than the admitted sworn oral statement of Officer Johnson in any way prejudiced his constitutionally guaranteed rights.

Based on the foregoing, it is submitted that this question presents no substantial Federal question and thus it is not the proper subject of an appeal to this Court. *Zucht v. King,* 260 U.S. 174 (1922); 28 U.S.C. Supreme Court Rule 15 (e), (Supp. 1969).

B.

THE QUESTION PRESENTS NO SPECIAL AND IMPORTANT REASON FOR THIS COURT TO REVIEW THE DECISION OF THE SUPREME COURT OF ARKANSAS.

It is the contention of the State of Arkansas that the papers involved herein do not disclose a proper case review within the sound discretion of this Court to grant review pursuant to 28 U.S.C. § 2103 and Rule 19 of this Court. From the arguments above, it is respectfully sub-

mitted that even if this case were one which fell within the appellate jurisdiction of this Court, it presents no substantial Federal question which would compel this Court to take jurisdiction on appeal. *Zucht v. King, supra.* It is urged to this Court that this is a case of isolated significance, and being such a case presents no special and important reasons for granting a writ of certiorari. *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955). The Supreme Court of Arkansas, even though it held valid the procedure for obtaining a search warrant here under attack, said:

> There can be no question as to the better procedure. The preservation of the proceedings before the magistrate issuing the warrant is much to be preferred. Time erases the availability of witnesses and the memory of those witnesses still available, particularly in the instances of many belated petitions in criminal cases. On the other hand, it is not for us to insert the provision into the law.

451 S.W.2d 225 at 228.

It is of further significance that this case validated a search warrant for which the supporting affidavit could not be produced by the state at trial, but the warrant was unquestionably issued by a disinterested judge upon his finding of probable cause from evidence presented by the sworn statement of a Police officer. Facts sufficient to support a finding of probable cause were recorded by the Judge from the statement of the Police Officer in the handwriting of the Judge on the face of the search warrant. 251 S.W.2d 225, at 227.

The procedure followed by the State in this case is not contrary to the holdings of this Court in cases discuss-

ing the rights of citizens under the Fourth Amendment and is within the powers reserved to the State in the conduct of their own local Police affairs. *Ker v. California, supra.*

For the reasons stated, it is respectfully submitted that the first question raised by the appellant in his jurisdictional statement presents no issue which would necessitate a review by this Court of the decision of the Supreme Court of Arkansas.

QUESTION TWO

WAS THE SEARCH WITHOUT A WARRANT OF APPELLANT'S AUTOMOBILE AT THE TIME OF HIS ARREST A LAWFUL SEARCH AND SEIZURE?

The second question presented by the appellant is whether the search without a warrant of appellant's automobile at the time of his arrest was a lawful search and seizure. This question raises no substantial Federal issue. The right of officers to stop and search motor vehicles under certain circumstances without a warrant or previous arrest was treated thoroughly in 1925 with the pronouncement in *Carroll v. United States,* 267 U.S. 132 (1925). In the instant case, the Supreme Court of Arkansas agreed with the trial court that on the facts presented, supported by the evidence adduced, the search and seizure complained of by the defendant was based on probable cause to believe the vehicle contained that which by law is subject to seizure. *The defendant did not challenge the search on the grounds that it would have been practicable under the circumstances for the Officer to have obtained a search warrant before making a cursory examination of the con-*

tents of the vehicle. Thus this question presents only one of weight and sufficiency of the evidence, and as such does not present a substantial Federal question. While the duty of the Supreme Court of the United States in reviewing a conviction in a state court upon a complaint that the procedure through which it was obtained violates due process of law is said to call for an examination of the evidence to determine whether a Federal Constitutional right has been denied, expressly or in substance and effect, the great respect to be accorded in that examination to the conclusions of the State judiciary leads to the acceptance of the conclusion of the trier of fact on disputed issues unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process or equal protection. *Ker v. California, supra; Akins v. Texas,* 325 U.S. 398 (1945). In deciding there was reasonable cause for the search, the Supreme Court of Arkansas reviewed the evidence as follows:

> In view of the total circumstances in the case before us, we think the search was reasonable and the fruits of that search admissible. Officer Johnson testified that he had been reliably informed that James Tygart would be returning from Mexico with a quantity of illegal drugs and that he would be driving a 1960 red and white Rambler. Subsequently, and at an unusual night hour, Johnson identified the car and the driver on a "back-door route" to Springdale or Fayetteville, his logical destinations.

451 S.W.2d 225 at 226. Based on the above it is urged that the conclusion of the state courts was based on ample evidence and was not lacking at all in support in the evidence; to give it effect would work no unfairness. *Akins v. Texas, supra.*

Officer Johnson and two other officers stopped Tygart at approximately 3:30 a.m. on May 22, 1969 on Highway 68 just east of Tonitown, Arkansas. After checking Tygart's driver's license, the Officers made a cursory search of the car. This search turned up two firearms on the transmission swell in the front floorboards and a quantity of Dexedrine tablets on the platform in the back of the station wagon. (T. 17-18) It is important to note that the search conducted at this time was confined to that area immediately within the reach of the occupants of the automobile and did in fact produce firearms. *Terry v. Ohio, supra.* It is seen that the search and seizure complained of in this instance by the appellant was lawful and reasonable under at least two theories. The Supreme Court of Arkansas found justification for the search based on the rules set down by this Court in *Carroll, supra.* It is also urged by the State of Arkansas that the search complained of was lawful and reasonable under the rules set down by this Court in *Terry v. Ohio, supra.*

It is further urged that on this issue the jurisdictional statement of the appellant presents no special and important reasons for this Court to consent to review the decision of the Supreme Court of Arkansas. 28 U.S.C. Supreme Court Rule 19 (Supp. 1969).

CONCLUSION

James Tygart was convicted after a fair and impartial trial. The decisions of the trial court and of the Supreme Court of Arkansas were based on substantial evidence and were in accord with applicable decisions of this Court. The statute relied on by appellant to confer jurisdiction on this Court to hear this appeal does not confer jurisdiction in this case. By his jurisdictional statement Appellant has

raised no special and important reason for this Court to review the decision of the Supreme Court of Arkansas. In accordance with Appellee's arguments and citations of law herein, this appeal should be dismissed, and this Court should, within its sound discretion, decline to review the decision appealed from.

Respectfully submitted,

JOE PURCELL
Attorney General

ROBERT D. SMITH, III
Deputy Attorney General

Attorneys for Appellee
Justice Building
Little Rock, Arkansas 72201

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 1970, three copies of the foregoing brief were mailed, postage prepaid, to the Honorable Jeff Duty, Attorney, 209 West Elm Street, Rogers, Arkansas 72756.

ROBERT D. SMITH, III
Deputy Attorney General
Justice Building
Little Rock, Arkansas 72201

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 26 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

JAMES TYGART .....APPELLANT

vs. No. 311, October Term, 1970

STATE OF ARKANSAS .....APPELLEE

RESPONSE TO MOTION TO DISMISS APPEAL

APPEAL FROM ARKANSAS SUPREME COURT

Jeff Davis Duty, Jr.
and
Jeff D. Duty
ATTORNEYS FOR APPELLANT
209 West Elm Street
Rogers, Arkansas 72756

INDEX

CASES **Page**

79 C.J.S. 855, Sec. 73 2

Carroll v. United States, 367 U.S. 132 3

IN THE

Supreme Court of the United States

JAMES TYGART ..... APPELLANT

vs. No. 311, October Term, 1970

STATE OF ARKANSAS ..... APPELLEE

RESPONSE TO MOTION TO DISMISS APPEAL

APPEAL FROM ARKANSAS SUPREME COURT

1. It is respectfully submitted that under the 4th Amendment to the Constitution of the United States, a written affidavit is required before a search warrant may be issued and that the search warrant must be based on such written affidavit made under oath or affirmation.

This question has not heretofore been decided by the Supreme Court of the United States as far as our research has revealed. The only case book law which we have uncovered in research is the rule stated in **79 C.J.S. 855, Sec. 73:**

> "A valid search warrant may issue only upon an application therefor under oath or affirmation in the form of a complaint or affidavit sufficient in form and substance to support the warrant."

Under Amendment 14 to the Constitution of the United States, Amendment 4 applies to the States. This question is therefore important to the due administration of criminal law and the question of due process.

2. In this case the defendant timely raised the questions of violations of Amendment 4 to the Constitution of the United States and Amendment 14 to the Constitution of the United States in regard to the search of the motor vehicle without a search warrant. The officers under testimony had been informed that the defendant would be returning from Mexico with a quantity of illegal drugs and that he would be driving a 1960 red and white Rambler. Subsequently, and later, the officers stopped this 1960 red and white Rambler. The appellee states that the defendant did not challenge the search on the grounds that it would have been practicable for the officers to obtain a search warrant. It is respectfully submitted that when the question of the violation of the Constitution was raised in the trial court and in the Supreme Court that this raised on the questions inherent under the Constitution. The burden was on the State to prove that it was not practicable to obtain a search warrant. Under the facts in this case, the officers having prior knowledge of the defendant driving a particular car, it was on its face practicable for the officers to obtain a search warrant for this particular car. We respectfully submit and repeat that this question was raised when the question of the violation of the constitutional guaranty against unreasonable searches and seizures was raised in the trial court and that said search was in violation of Carroll v. United States, 367 U.S. 132.

Respectfully submitted,

Jeff Davis Duty, Jr.
and
Jeff D. Duty
Attorneys for Appellant

209 West Elm Street
Rogers, Arkansas 72756